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IN THE

Supreme Court of the United States

October Term, 1969

No. 492

UNITED STATES OF AMERICA,

Respondent,

against

TWO TRACTS OF LAND IN THE TOWN OF BROOKHAVEN, COUNTY OF SUFFOLK, STATE OF NEW YORK, and SAILORS HAVEN FIRE ISLAND, INC., *et al.*,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDICES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on May 26, 1969.

Citations to Opinions Below

The judgment of the District Court is unreported and is printed as Appendix B-1 hereto, p. A12, *infra*. No opinion was rendered by the District Court. The opinion of the Court of Appeals is unreported and is printed in Appendix B-2 hereto, p. A14, *infra*.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 26, 1969. Rehearing was denied on June 11, 1969. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

Questions Presented

1. May evidence, such as a prior vouched-for appraisal, admissible under the applicable state and Federal rules of evidence, be excluded from a jury trial of a condemnation action commenced by the United States, on the grounds that the introduction of such appraisal would be "counter to governmental policy," in effect a form of executive privilege, even though such appraisal was used, not only to induce the consent of Congress to authorize the condemnation of Petitioner-Defendant's* property, but was also made available to the Claimant prior to the taking and used to obtain its consent to the taking, which consent was necessary under the statute authorizing the taking?

2. Was the exclusion of such appraisal, under the circumstances, of such essential unfairness as to deny Claimant due process of law and just compensation?

Statutes and Rules Involved

This Petition involves the construction and application of the Fire Island National Seashore Act, Public Law 88-587, 78 Stat. 92 (1964), Fifth Amendment to the United States Constitution and Rule 43(a) of the Rules of Civil Procedure.

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* In order to more clearly define the nature of petitioner's position in this action, it will be referred to as "Claimant."

Public Law 88-587 is printed in full in Appendix A to this Petition. Section 2(e), which establishes a "condemnation by consent" procedure is set out below:

"(e) With one exception the Secretary shall not acquire any privately owned improved property or interests therein within the boundaries of the seashore or any property or interests therein within the communities delineated on the boundary map mentioned in section 1, except beach waters and adjoining land within such communities which the Secretary determines are needed for public access to the beach, without the consent of the owners so long as the appropriate local zoning agency shall have in force and applicable to such property a duly adopted, valid, zoning ordinance that is satisfactory to the Secretary. The sole exception to this limitation on the power of the Secretary to condemn improved property where appropriate zoning ordinances exist shall be in the approximately eight-mile area from the easterly boundary of the Brookhaven town park at Davis Park, in the town of Brookhaven, to the westerly boundary of the Smith Point County Park. In this area only, when the Secretary deems it advisable for carrying out the purposes of this Act or to improve the contiguity of the park land and ease its administration, the Secretary may acquire any land or improvements therein by condemnation. In every case in which the Secretary exercises this right of condemnation of improved property the beneficial owner or owners (not being a corporation) of any improved property so condemned, provided he, she, or they held the same or a greater estate in the property on July 1, 1963, may elect as a condition of such acquisition by the Secretary any one of the following three alternatives:

78 Stat. 929, 78 Stat. 930.

(1) that the Secretary shall take the said property in fee simple absolute and pay the fair market value thereof as of the date of such taking;

(2) that the owner or owners shall retain a life estate in said property, measured on the life of the sole owner or on the life of any one person among multiple owners (notice of the person so designated to be filed in writing with the Secretary within six months after the taking) or on the life of the survivor in title of any estate held on July 1, 1963, as a tenancy by the entirety. The price in such case shall be diminished by the actuarial fair market value of the life estate retained, determined on the basis of standard actuarial methods;

(3) that the owner or owners shall retain an estate for twenty-five years. The price in this case shall likewise be diminished by the value of the estate retained."

The Fifth Amendment provides as follows:

"*Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Rule 43(a) provides as follows:

> "(a) *Form and Admissibility.* In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the court of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

Statement of Case

(a) Property

This case arose as a result of the condemnation of Claimant's property pursuant to Public Law 88-857, 78 Stat. 928, for the purpose of acquiring land for the Fire Island National Seashore. Claimant's property consisted of three separate segments, including (i) an improved parcel of approximately 10 acres, (ii) an unimproved parcel of approximately 20 acres and (iii) an underwater parcel of approximately 25 acres.

(b) Negotiations and Consent of Claimant

Public Law 88-857 is an unusual statute in that, while the Secretary of the Interior is authorized to acquire land for the National Seashore under section 2(e) of that act,

he may not acquire improved property "without the consent of the owners".*

Prior to the condemnation of Claimant's property, the National Park Service of the Department of Interior attempted to negotiate the purchase of Claimant's property on Fire Island. It was clear during all negotiations that while the Government had the power to take the unimproved upland and underwater lands, it could not, without Claimant's consent, vest title to the improved parcel. An offer of $600,000—some $225,000 more than the amount awarded by the jury—was made to Claimant and rejected (A40, *infra*).**

On December 6, 1965, Claimant consented to the condemnation of the improved parcel provided that its other property also be taken. On December 17, 1965, the Department of the Interior requested that Claimant obtain an appraiser and meet with the Park Service to negotiate (A39, *infra*).

In a letter to the Secretary of the Interior dated March 3, 1966, Claimant's attorney indicated that the parties had met as agreed upon, that the property had been re-evaluated by the Government's appraiser, Joseph J. Blake, and that a final offer in the sum of $600,000 had been made; inasmuch as Claimant's appraisal was in excess of $900,000, the Government's offer was rejected. Claimant then requested action on its earlier consent to the condemnation (A40, *infra*).

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* Claimants' research can find only one other instance of condemnation by consent. See 57 Stat. 565, 42 U.S.C. §1534 (wartime amendment to Lanham Act), discussed in *United States* v. *Certain Parcels of Land in Fairfax County*, 245 U.S. 344 (1953), *rehearing denied*, 345 U.S. 960.

** Reference is to page A40 of Appendix C to this petition which contains extracts of testimony and argument before the trial court.

Mr. Blake's appraisal report and value was disclosed to Claimant during the negotiations leading up to Claimant's consent and was a vital part of such discussions. Indeed, it is Claimant's contention that without knowledge of this appraisal and the belief that it would be used at the trial, Claimant would not have consented to such condemnation.

On May 2, 1966, the Government vested title by consent to *all* of the Fire Island property owned by Claimant.

(c) The Trial

During the trial, Claimant's appraiser testified that in his opinion, Claimant's property was valued at $985,000 at the time of vesting.

The Government presented only one expert appraiser witness, Louis Modica, and not Joseph J. Blake. Mr. Modica valued Claimant's property at only $300,000.

(d) The Blake Appraisal

At the trial, Claimant's attorneys subpeonaed Joseph Blake, the Assistant U.S. Attorney trying the case, and Leslie W. Piel, the regional real estate officer of the National Park Service, to produce Mr. Blake's appraisal used in the negotiations to obtain Claimant's consent to the condemnation (A22, *infra*). This appraisal was offered by Claimant's attorney as an admission against interest. The offer was rejected by the trial court. Claimant later made an offer of proof to the trial court maintaining that the Blake appraisal had been vouched for by the Government since it had been utilized by them in obtaining funds from

the Congress.* This offer was likewise rejected by the trial court.

The court specifically refused to admit the Blake appraisal as an admission against interest by the Government despite the offer of proof (A29, *infra*).

(e) The Verdict

The jury verdict resulted in an award of $375,000, $225,000 less than the offer in December 1965, based on the Blake appraisal.

(f) Motion to Set Aside Verdict

On April 10, 1968, Claimant's oral motion to set aside the verdict was argued. The entire argument is contained in the record. *Inter alia,* Claimant contended that it was error for the trial court to refuse to admit the Blake appraisal. That motion was denied.

Reasons for Granting the Writ

This application raises two important questions on which a decision by this Court is needed, one evidentiary and one constitutional.

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* On June 10, 1963, the Secretary of Interior advised Congress that

> "'Based upon studies thus far made, the aggregate area of the national seashore will be approximately 8,000 acres, and we believe that land acquisition costs probably will not exceed $20 million. The data required by the act of July 25, 1965 (5 U.S.C. 642a), are enclosed."

Senate Report 1300, 88th Congress, 21 Sess., at p. 7.

The evidentiary question is to the extent to which materials prepared by the executive branch of the Government to induce legislative action by the Congress may be excluded from use as evidence in Federal court litigation to which the Government is a party on the grounds of executive privilege or public policy. The Court of Appeals' decision here on grounds of public policy, a new privilege excluding related and admittedly admissible evidence. This is contrary to the underlying philosophy of recent Federal cases, including cases of this Court, which favors expanding the scope of admissibility and limiting the scope of exclusion on grounds of executive privilege to matters of national security and confidential intra-governmental correspondence. However, the extent to which executive privilege remains available in non-national security cases, if at all, has not been defined. This case presents the Court with an excellent opportunity to define the scope of the privilege in such cases. The lower courts are clearly in need of such guidance on this important issue; in many respects their decisions and philosophies are in conflict.

The constitutional issue arises from the use of the excluded appraisal to induce the Claimant to give its consent to the taking, without which consent there could have been no taking under the statute, as well as to induce Congress to appropriate the necessary funds. The subsequent suppression of the appraisal raises serious questions of essential fairness necessary to meet the constitutional requirement of just compensation. This Court has never ruled on the degree of fairness which the United States must exercise when taking the private property of its citizens for a public purpose. This issue is thus an important question of Federal law which should be settled by this Court.

POINT I

This Court has not clearly defined the scope of executive privilege to be accorded the Government in litigation with its citizens.

Although we now live in an era of ever increasing governmental power, this Court has never fully defined the scope of executive privilege to be granted the Government in court actions between it and its citizens. More particularly, this Court has never fully addressed itself to the problem of granting executive privilege to exclude otherwise admissible evidence* which does not pertain to national security.

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* The appraisal which was excluded in the instant case would clearly be admissible as an "admission against interest" under both Federal and state rules of evidence. See Advisory Committee's Note to Rule 8-01 of the Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates (March 1969), ("Under established principles, an admission may be made by adopting or acquiesing in the statement of another."). See also *Pekelis* v. *Transcontinental Western Air*, 187 F. 2d 122, 128-9 (2d Cir. 1951), *cert. denied*, 341 U.S. 951 (report of a corporate employee submitted to the Civil Aeronautics Board by the corporation); *United States* v. *United Shoe Mach. Corp.*, 89 F. Supp. 349, 352 (D. Mass. 1950) (statement of a corporate employee admissible if "adopted or if the corporation conducted its business on basis of such statement."). Under Rule 43(a) of the Federal Rules of Civil Procedure, the appraisal is also admissible if admissible under state rules of evidence. See the following New York State cases in which prior vouched-for appraisals were held to be allowable as admissions against interest upon making a proper foundation: *Matter of City of New York (Bleecker Street)*, 143 M. 2d 173, 250 N.Y.S. 2d 664, 666 (Sup. Ct. 1964) (appraisal prepared by City Real Estate Department and submitted to Board of Estimate); *City of Buffalo* v. *Stozzi*, 54 M. 2d 1031, 283 N.Y.S. 2d 919, 922 (Sup. Ct. 1967); *Matter of City of New York (Throgs Neck Expressway)*, 16 A.D. 2d 570, 229 N.Y.S. 2d 947, 953 (1st Dept. 1962), *reversed on other grounds*, 13 N.Y. 2d 700 (1965); *City of Watertown* v. *Jerry's Watertown Restaurant & Hotel, Inc.*, decided May 25, 1967, Sup. Ct., Jefferson Co., *aff'd, without option*, 30 A.D. 2d 585, 290 N.Y.S. 2d 18 (4th Dept. 1968); *City of Binghamton* v. *Arlington Hotel, Inc.*, 30 A.D. 2d 585, 290

The last occasion in which executive privilege was considered by this Court was *United States* v. *Reynolds*, 345 U.S. 1 (1953). *Reynolds* is not controlling here, since the Court specifically refused to rule on the broad contention raised by the Government that "the executive department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest". 345 U.S. at 6. Instead the Court chose to rely on the narrow—and generally conceded—ground that the Government is privileged not to divulge matters relating to national security. Similarly, earlier cases interpreting the validity of Federal "housekeeping" regulations are not in point on the question presented here. See *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951); *Boske* v. *Comingore*, 177 U.S. 459 (1900). *Jencks* v. *United States*, 353 U.S. 657 (1957), dealing as it does with criminal investigations, is also not in point.

The lower courts have attempted to define the circumstances in which the Government may exercise its executive privilege—if indeed any such privilege does exist—in matters not relating to the national security, but the results have been contradictory. *Compare, Kaiser Aluminum & Chemical Corp.* v. *U.S.*, 157 F. Supp. 939, 947 (Ct. Cl. 1958) where Mr. Justice Reed formulated the public policy involved in a claim of privilege for the "administrative reasoning process" protecting "open, frank discussion

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N.Y.S. 2d 360, 352 (3rd Dept. 1968); *Matter of East Houston Street Area Houses*, N.Y.L.J., Oct. 29, 1968, p. 17, col. 4 (Sup. Ct.) ("The courts have formulated a rule that the general basis for the admission of any prior appraisals is an admission against the condemnee when it appears that the condemnor has adopted and used such prior appraisals.")

between subordinate and chief concerning administrative action" and *Davis* v. *Braswell Motor Freight Lines, Inc.*, 363 F. 2d 600 (5th Cir. 1966) ("intra-agency correspondence" privileged); *Machin* v. *Zuckert*, 316 F. 2d 336 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 896 ("confidential" material privileged) *with Mitchell* v. *Bass*, 252 F. 2d 513 (1958) (privilege denied where United States was third party and disclosure "could not result in any serious prejudice to the Secretary" of Labor); *Campbell* v. *Eastland*, 307 F. 2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 ("Executive privilege is narrowly confined to matter affecting national security, such as military and state secrets. It must not be invoked lightly.")

In light of past experience with the lack of a clear definition of executive privilege, the decision of the Second Circuit for which certiorari is sought becomes all the more disturbing. Past applications of executive privilege usually relied on confidential relationships or the necessity to protect the correspondence necessary for orderly administrative decisions. The "governmental policy" alluded to by the Circuit Court can be viewed as nothing else but a privilege for the executive branch in dealing with the legislative branch. Thus, for the very first time, a form of executive privilege has been extended beyond the traditional scope of national security and the need for confidential decision making. The appraisal denied admission in the instant case is neither confidential—its conclusion was fully disclosed to both the Congress and the Claimant—or necessary for the making of an internal administrative decision. Even more disturbing is the implication of the Circuit Court's decision that one branch of the Government must be protected in deceiving another:

"while federal agencies have a duty to give Congress as accurate a notion of the cost of a project as they feasibly can, certainty is impossible and the agencies doubtless recognize it to be better to err on the high side rather than the low. While an error on the high side will mean only that some of the appropriation will not be used, one on the low side may involve the Government in a project that Congress would not have authorized if properly apprised of the facts:" Appendix B-2, p. A20, *infra*.

Moreover, the above reasoning seems to defy the rational experience of man as a political animal. Few serious observers of government can recall instances in which the authorization of government projects, after the submission of data from executive agencies, proved too high rather than too low. The instant case is a prime example of the unlikelihood of this. It scarcely merits belief that the Interior Department, after many years of seeking to obtain authorization for the Fire Island National Seashore, sought to convince Congress of the desirability of authorizing it by deliberately over-estimating the cost of acquisition—to the extent of 100%.

Lacking a strong policy reason for permitting a new privilege to be grafted on to the federal rules of evidence, this Court should grant certiorari here in order to safeguard the continued liberal admissibility of evidence in Federal courts and to clearly define the full scope of executive privilege, so that the lower Federal courts may be properly guided.

POINT II

This Court should take certiorari of this appeal to establish a rule as to the essential fairness necessary for the taking of property by due process and the payment of just compensation.

Property can only be taken for a public use by "due process of law" and with "just compensation." U.S. Constitution, Amendment V. Thus, by constitutional mandate, compensation by itself is not sufficient; justice in the sense of fairness and equality is necessary. This Court has already noted in condemnation cases that:

> "The words 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equality' * * *" *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 124 (1949). See also *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 631 (1961).

Put in its simplest form, Claimant wishes this Court to hold that the Government cannot trick a citizen to obtain what it desires. The rules of evidence, we submit, must be structured to prevent, rather than assist, any such executive over-reaching.

The Circuit Court noted that for the Government, in its dealings with Congress, it is "better to err on the high side rather than on the low." But what of the Government's dealings with the Claimant? It cannot seriously be argued that in inducing Claimant's consent, it was better to supply high appraisals—which it did not intend to use on the trial.

The very notion that the Government could use a higher appraisal for one aspect of its dealings with Claimant—

obtaining its consent to a condemnation which it could have forestalled by simply refusing to consent—and then turn around and use an appraisal valuing Claimant's property at exactly half of the earlier appraisal surely must strike fair-minded persons as a deceitful endeavor which our Government has no business engaging in. Consistency is not always a virtue, and we do not here argue that the Government was bound by the earlier appraisal. But, having used it in its pre-litigation dealings with Claimant, which seriously changed its position in reliance on it, the attempt by the Government to hide from the jury the fact that it previously adopted the Blake appraisal as its own, is a clear violation of the essential fairness which must always be a party of "due process" and "just compensation."

This Court has never ruled on the kind and quality of non-judicial relationships between the Government and a condemnee which may affect the due process with which his property is taken and just compensation paid.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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